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No. 03-1670

In The
Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner William Thurston files this supplemental brief as authorized by Supreme Court Rule 15.8 to bring to the Court's attention two recent decisions that were issued after he filed his petition for a writ of certiorari in this case on June 16, 2004. On June 18, 2004, Chief Judge Young of the United States District Court of the District of Massachusetts issued a sentencing opinion in *United States v. Green*, ___ F. Supp. 2d ___, 2004 WL 1381101 (D. Mass. June 18, 2004), which addressed Thurston's case and, specifically, one of the departure issues presented in his certiorari petition. On June 24, 2004, this Court decided *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004), which bears on this case insofar as Thurston's sentence was enhanced by twenty levels under the United States Sentencing Guidelines on the basis of facts (other than a prior conviction) found by a judge under a preponderance-of-the-evidence standard, not by a jury under a reasonable-doubt standard.

This case is scheduled for the Court's consideration at its conference on September 28, 2004.

DISCUSSION

I. The District Court's Decision in *United States v. Green* Makes Clear That the First Circuit Failed to Recognize the Compelling Circumstances That Warranted a Departure Based on the Disparity Between Thurston's Sentence and a More Culpable Co-Defendant's Sentence.

In a wide-ranging decision, Chief Judge Young concluded in *United States v. Green*, ___ F. Supp. 2d ___, 2004 WL 1381101 (D. Mass. June 18, 2004), that the federal Guidelines violate the rule of *Apprendi*. Most relevant to Thurston's original filed certiorari petition is that Judge Young, in reaching his conclusion, provided a lengthy

description and analysis of real-world sentencing and plea bargaining under the federal Guidelines. The court's discussion included "straight talk" on the conduct of prosecutors in the District of Massachusetts, where Thurston was tried and sentenced, *e.g.*, *id.* at *2-16, and specific commentary on Thurston's case, *id.* at *4 n.26, *9. *Green* reinforces the merits of Thurston's arguments in support of granting certiorari on the question whether in compelling circumstances a district court has discretion to depart based on a disparity between the sentences of similarly situated co-defendants.[1] In short, the court cited Thurston as a "telling example" of a defendant who effectively was punished for exercising his right to trial—contrasted with pleading co-defendant Joseph Isola's probation-only sentence. *Id.* at *4 & n.26. The district court concluded that "prohibited fact bargaining" helped drive the "cruelly disparate sentences" between Thurston and Isola. *Id.* at *9. It is precisely in these prejudicial circumstances—which "the Court of Appeals [] failed to detect," *id.* at *9—that district courts should have discretion to depart. *See* Petition at 21-30.

The court explained that "[t]o achieve its ends, the government routinely imposes a stiff penalty upon defendants who exercise their constitutional right to trial by jury." *Green*, 2004 WL 1381101, at *2. "[A] massive power shift from the judiciary to the executive" was expected under the Guidelines system, but "it was believed that a robust and independent judiciary could hold any excesses in check." *Id.* at *3. This latter expectation has not been borne out: prosecutors have been able "to manipulate sentences

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[1] Question three of the petition reads: "Whether a district court has discretion to depart from the applicable guideline range based on a disparity between the sentences of similarly situated co-defendants, when otherwise a defendant would be prejudiced by prosecutorial manipulation of the guidelines, or punished for exercising the constitutional right to trial." Petition For a Writ of Certiorari at i [hereinafter Petition].

and sentencing policy" and "the efforts of individual judges to control the whirlwind have been but a weak reed." *Id.* "As a result, the Sixth Amendment guarantee of trial by jury has been eroded as never before in the history of our nation. . . ." *Id.*

The court in *Green* explained that one of the mechanisms used to manipulate the Guidelines is "fact bargaining," in which prosecutors take advantage of their practical ability to withhold "relevant conduct" information from the sentencing judge to induce the defendant to plead. *Id.* at *4 & n.25 (citing *Berthoff v. United States*, 140 F. Supp. 2d 50, 62 n.19 (D. Mass. 2001) (Young, C.J.) (defining "fact bargaining" as "the knowing abandonment by the government of a material fact developed by law enforcement authorities or from a witness expected to testify in order to induce a guilty plea"), *aff'd*, 308 F.3d 124 (1st Cir. 2002)). "[T]he very formalism of the process has enhanced [prosecutors'] ability to control the information flow to the judge." *Green*, 2004 WL 1381101, at *4.

> While there may still be judicial limits on the outer boundaries of a prosecutor's assertion of relevant conduct . . . none prevents a prosecutor from turning a blind eye on conduct otherwise relevant. . . . So it is that the phenomenon known as "fact bargaining" has come to flourish as never before in the federal courts. [¶] The Department [of Justice] today has the power—and the incentive—to ratchet punishment up or down solely at its discretion. It does so most often to burden a defendant's constitutional right to a jury trial and thus force a plea bargain. The result: In the District of Massachusetts, an individual who stands up to the Department and insists on a jury trial gets, upon conviction, a sentence 500 percent longer than a similarly situated defendant who pleads guilty and cooperates.

Id. (footnotes omitted).

Judge Young pointed to the sentences of Thurston and his co-defendant Isola as a "telling example" of the sentencing disparity and prejudice to jury-trial rights caused by this prosecutorial manipulation. *Id.* at *4 n.26.[2] He concluded that "charge bargaining coupled with prohibited fact bargaining drove the cruelly disparate sentences in *United States v. Thurston*, but the Court of Appeals again failed to detect it, focusing instead on the perceived inadequacies in the district court's sentencing rationale." *Id.* at *9 (footnotes omitted). "Fact bargaining" "is flat-out illegal." *Id.* at *9 & n.69 (citing Guidelines provisions). But because "the practice constitutes a direct fraud on the Court, it is difficult to uncover." *Id.* at *9.[3] Nonetheless, Judge Young has been overtly critical of the First Circuit's willingness to accept the government's explanations, and failure to explore the issue in other cases. *See id.* at *9 & nn.70-71.

The *Green* decision makes clear that the First Circuit failed to recognize the compelling circumstances that warranted the sentencing judge's downward departure in this case. The prosecutors engaged in improper "fact bargaining" with Isola to secure a *nolo contendere* plea, then sought to punish Thurston more severely when he exercised his right to trial, by arguing for double-digit sentencing enhancements based on "relevant conduct" they withheld from the judge at Isola's sentencing. In such circumstances, as *Green* implies, there is a profound need for district courts to have departure power as a check

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[2] To the extent the opinion might be read to imply that Isola *cooperated* with the government, that reading is incorrect and unsupported by the record. *See* Petition at 2-3, 27.

[3] *See also id.* at *46 ("[F]act bargaining 'involves a fraud on the court as the government's recital of material facts during the plea colloquy and at sentencing necessarily must omit or at minimum gloss over facts material to sentencing.' Ultimately, massive sentencing disparities result from such conduct.") (quoting *Berthoff*, 140 F. Supp. 2d at 62) (footnotes omitted).

against prosecutorial manipulation of the Guidelines system, especially when that manipulation results in punishing a defendant for exercising the right guaranteed to him by the Sixth Amendment.

II. This Case Presents Sixth Amendment Issues Based on the Reasoning of This Court's Decision in *Blakely v. Washington*.

Eight days after Thurston filed his certiorari petition, the Court decided *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004). In *Blakely*, the Court applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and held that a criminal sentence imposed under Washington state law violated the Sixth Amendment to the extent it was based on facts found by a judge rather than found by a jury or admitted by the defendant. The Court revisited the rule it had announced in *Apprendi*: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490). The Court held:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

124 S. Ct. at 2537 (emphasis in original) (internal citations omitted).

Blakely represented "a sea change in the body of sentencing law." *United States v. Ameline*, 376 F.3d 967, 973 (9th Cir. 2004). One court has stated that "*Blakely* redefined 'statutory maximum.'" *United States v. Booker*, 375 F.3d 508, 514 (7th Cir. 2004), *cert. granted*, No. 04-104,

___ S. Ct. ___, 2004 WL 1713654 (Aug. 2, 2004); *see also Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting) (explaining that "[u]nder the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense" and "must now be charged in an indictment and submitted to a jury"). As Justice O'Connor correctly noted, "there is no map of the uncharted territory blazed by [the Court's] unprecedented holding" in *Blakely*. *Id.* at 2547 n.1 (O'Connor, J., dissenting).

On August 2, 2004, the Court granted certiorari in *United States v. Booker*[4] and *United States v. Fanfan*[5] to decide whether the Sixth Amendment is likewise violated by imposition of an enhanced sentence under the United States Sentencing Guidelines.

Thurston's case presents the same Sixth Amendment question as *Booker* and *Fanfan*. Thurston was convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, and sentenced in June 2002 under the federal Guidelines. The base offense level for this crime was six. Based on facts found by the judge under a preponderance-of-the-evidence standard, not by the jury under a reasonable-doubt standard, Thurston's sentence was increased by twenty levels:

> This is my ruling with respect to the offense level. A base offense level of 6, an aggravated role in the offense which is 4, more than minimal planning which is 2, and an intended loss of 14, which adds up to an offense level of 26. That makes the range between 63 months and 78 months.

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[4] 375 F.3d 508.

[5] *United States v. Fanfan*, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004) (partial tr. of sentencing hr'g), *cert. granted before judgment*, No. 04-105, ___ S. Ct. ___, 2004 WL 1713655 (Aug. 2, 2004).

Pet. App. 203a-204a.[6] Based solely on the jury's general verdict of conspiracy to defraud, the applicable guidelines range would be zero to six months' imprisonment. *See* U.S.S.G., Sentencing Table. Once the district court imposed the enhancements, however, Thurston's sentence increased to a range of sixty-three to seventy-eight months' imprisonment, *see id.*, capped by 18 U.S.C. § 371 at sixty months. U.S.S.G. § 5G1.1(a); 18 U.S.C. § 371; 28 U.S.C. § 994(b)(1). The sentencing judge departed downward on two grounds from offense level twenty-six to level ten, Pet. App. 212a-213a, 233a-234a, but the First Circuit reversed the departure on both grounds, remanding for imposition of the statutory maximum sentence of five years' imprisonment. *Id.* 63a-64a.

This case would also present a different but related Sixth Amendment question even if the Court were to reject the Sixth Amendment challenges raised in *Booker* and *Fanfan*. Thurston's case squarely presents the fact pattern in which to test the two Sixth Amendment problems with federal sentencing identified by the Brief of *Amici Curiae* An Ad Hoc Group of Former Federal Judges In Support of Neither Party, filed September 1, 2004 in *Booker* and *Fanfan*. Not only was Thurston's sentence enhanced in the first instance, but the sentencing judge's downward departure, which offset sixteen of the twenty levels of enhancements, was reversed by the court of appeals under

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[6] The base offense level and enhancements correlate to the following provisions of the Guidelines: United States Sentencing Commission, *Guidelines Manual* (Nov. 1992) [hereinafter U.S.S.G.] § 2X1.1(a) (providing base offense level for conspiracy to defraud is same as for fraud); *id.* § 2F1.1(a) (providing base offense level for fraud is six); *id.* § 2F1.1(b)(1) (providing for fourteen-level increase for "loss" greater than $5,000,000, up to $10,000,000); *id.* § 2F1.1(b)(2) (providing for two-level increase "[i]f the offense involved [] more than minimal planning"); *id.* § 3B1.1(a) (providing for four-level increase "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive"). The November 1992 Guidelines were used to avoid retroactivity problems.

a nondeferential *de novo* review standard that the court interpreted the PROTECT Act[7] to require. The First Circuit, in conflict with other circuit courts of appeals' post-*Koon*[8] decisions, declared one ground on which the sentencing judge's departure was based—the disparity between Thurston's sixty-month sentence and a more culpable, non-cooperating co-conspirator's probation-only sentence—to be unavailable as a matter of law. *See* Petition at 6, 21-30. Additionally, the First Circuit reversed on the second departure ground—Thurston's strong record of charitable works and community service, which the sentencing judge found the most extraordinary he had seen in fourteen years of sentencing—after holding the PROTECT Act's *de novo* review provisions applicable, and determining *de novo*, with no deference to the sentencing judge's experience and expertise, that Thurston did not qualify for such a departure. *See id.* at 6-7, 18-21.

In short, through the operation of the PROTECT Act's new departure-restricting provisions, as well as the First Circuit's failure to afford the breadth of departure discretion required by *Koon*, Thurston was subjected to a scheme more akin to determinate sentencing. The question therefore arises whether the Sixth Amendment is offended by a system that requires a judge to find facts and impose sentence enhancements, yet simultaneously eviscerates that judge's discretion to depart to reach a just, individualized sentence. *Booker* and *Fanfan* involve sentence enhancements under the Guidelines but not in conjunction with departure decisions.

The certiorari petition as originally filed did not include these Sixth Amendment questions because, before *Blakely*, this Court had rejected constitutional challenges to the Guidelines, and the circuit courts uniformly had

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[7] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

[8] *Koon v. United States*, 518 U.S. 81 (1996).

rejected *Apprendi*-based challenges to the Guidelines. But now, *Blakely*'s reasoning gives rise to a straightforward argument that Thurston's sentence violated his right to trial by jury. Accordingly, in a concurrent filing, Thurston moves for leave to amend his certiorari petition by the Amendment bound therewith, in which the following two questions are added to those presented in the original filed petition:

> 4. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.
>
> 5. If the answer to the question above is not an unequivocal "yes," the following question is presented: Whether imposition of such an enhanced sentence violates the Sixth Amendment when the sentencing judge's fact-intensive decision to depart from the applicable guideline range is subject to nondeferential *de novo* review, or when the sentencing judge is prohibited by law from departing based on a disparity between the sentences of similarly situated co-defendants.

See Motion to Amend Petition For a Writ of Certiorari, and Amendment bound therewith.

Thurston petitions for a writ of certiorari on these Sixth Amendment questions. *See id.* In the alternative, he asks that the petition be held and decided once the Court decides *Booker* and *Fanfan*, at which time summary disposition may be appropriate. *See id.* The questions presented in the original filed certiorari petition—pertaining to the retroactivity and interpretation of the PROTECT Act, the scope of *de novo* review of departures, and the availability of disparity-based departures—continue to be worthy of review by this Court, independent of the Amendment to the certiorari petition.

For these reasons, as well as the reasons set forth in the original filed certiorari petition, the motion to amend the certiorari petition, and the Amendment bound therewith, the Court should grant the petition, including the Amendment. In the alternative, this Court should defer ruling on the certiorari petition until the Court decides *Booker* and *Fanfan*. Then if the Court were to find that, in light of those decisions, this case presents questions worthy of review, the Court could grant certiorari on all or a subset of the questions. If the Court were instead to find none of the questions worthy of briefing and argument, it could nonetheless summarily reverse, or, if appropriate, it could grant, vacate, and remand for reconsideration in the lower courts in light of *Booker* and *Fanfan*. *See* 28 U.S.C. § 2106 ("The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."); Sup. Ct. R. 16.1 (providing for "summary disposition on the merits").

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be held and decided in light of this Court's decisions in the *Booker* and *Fanfan* cases, Nos. 04-104 and 04-105.

Respectfully submitted,

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